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7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

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10 UNITED STATES OF AMERICA,)
11 Plaintiff,) 2:09-CR-0079-KJD(RJJ)
12 v.)
13 HAROLD CALL,) RESPONSE IN OPPOSITION TO
14 Defendant.) DEFENDANT HAROLD CALL'S
MOTION TO DISMISS
15 _____)

16 Comes now the United States of America by and through its attorneys, Gregory A.
17 Brower, United States Attorney for the District of Nevada, and Gregory Damm, Assistant United
18 States Attorney, and responds in opposition to defendant Harold Call's Motion to Dismiss.

19 Defendant Call moves to dismiss Counts One, Two, Four and Five of the instant
20 indictment charging him with violations of Title 18, United States Code, Section 922(o), possession
21 and transfer of a machine gun, and Title 26, United States Code, Section 5845(d), possession of an
22 unregistered machine gun. Generally, defendant's argument has two primary points. Defendant first
23 claims that this Court is without jurisdiction to try defendant for possession of a homemade machine
24 gun which has not traveled in interstate commerce. Defendant also claims that under the Second
25 Amendment he has a right to possess a machine gun.

1 Defendant first argues that under United States v. Stewart, 348 F.3d 948 (9th Cir. 2003),
2 his possession of homemade auto sears was legal because defendant did not obtain his auto sears
3 using channels of interstate commerce. In the original 2003 decision in United States v. Stewart, the
4 Ninth Circuit concluded that because the defendant there had made his machine gun rather than
5 receive it through a transfer from another that the defendant's possession of his machine gun was
6 purely an intrastate possession which Congress could not regulate through the Constitution's
7 Commerce Clause. The Court found that Title 18, United States Code, Section 922(o) was
8 unconstitutional as applied to the defendant in that case. While arguably the Ninth Circuit's original
9 decision in United States v. Stewart could apply to defendant's manufacturing of the auto sears and
10 machine gun in his residence, the Ninth Circuit overruled its original decision on remand from the
11 Supreme Court. In 2006, the Ninth Circuit ruled in United States v. Stewart, 451 F.3d 1071 (9th Cir.
12 2006), that Section 922(o) which criminalizes the possession of homemade machineguns
13 manufactured intrastate was not an unlawful extension of Congress's commerce powers.
14 Consequently, defendant's possession of what he contends were homemade auto sears is criminal
15 under federal statute.

16 Defendant also claims that under District of Columbia v. Heller, the federal
17 government cannot limit his possession of machine guns under the Second Amendment. However,
18 courts considering the issue of the constitutionality of machine gun regulation since Heller have
19 concluded that Congress can constitutionally regulate the possession of machine guns. In United
20 States v. Gilbert, 286 Fed.Appx. 383, 386 (9th Cir.2008), the Ninth Circuit court explained that Heller
21 did not undermine the restrictions contained in Title 18, United States Code, Sections 922(g)(1) and
22 922(o). In United States v. Fincher, 538 F.3d 868, 874 (8th Cir.2008), the Eighth Circuit held that
23 Section 922(o) was a constitutional restriction on machine guns. See also United States v. Ross, 323
24 Fed. Appx. 117 (3d Cir. 2009); United States v. Williams, 2009 WL 578556 (W.D.Pa. 2009).

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1 The Supreme Court in Heller found that the District of Columbia's complete ban on
 2 handgun possession in the home violated the Second Amendment. The Court held that the "Second
 3 Amendment conferred an individual right to keep and bear arms." Heller, 128 S. Ct., at 2799.
 4 However, the Court also made clear that this right is not unlimited:

5 Like most rights, the right secured by the Second Amendment is not unlimited. From
 6 Blackstone through the 19th-century cases, commentators and courts routinely
 7 explained that the right was not a right to keep and carry any weapon whatsoever in
 8 any manner whatsoever and for whatever purpose.

9 Id., at 2816 (citations omitted). The Supreme Court stated that certain statutory restrictions on
 10 firearms are constitutional:

11 Although we do not undertake an exhaustive historical analysis today of the full scope
 12 of the Second Amendment, nothing in our opinion should be taken to cast doubt on
 13 longstanding prohibitions on the possession of firearms by felons and the mentally ill,
 14 or laws forbidding the carrying of firearms in sensitive places such as schools and
 15 government buildings, or laws imposing conditions and qualifications on the
 16 commercial sale of arms.

17 We also recognize another important limitation on the right to keep and carry arms.
 18 Miller [United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)]
 19 said, as we have explained, that the sorts of weapons protected were those "in common
 20 use at the time." 307 U.S., at 179, 59 S.Ct. 816, 83 L.Ed. 1206. We think that
 21 limitation is fairly supported by the historical tradition of prohibiting the carrying of
 22 "dangerous and unusual weapons."

23 The Supreme Court in Heller did not find that possession of machine guns is protected
 24 by the Second Amendment. "Machine guns are not in common use by law-abiding citizens for lawful
 25 purposes and therefore fall within the category of dangerous and unusual weapons that the
 26 government can prohibit for individual use." United States v. Fincher, 538 F.3d 868, 873-74 (8th
 Cir.2008); see also United States v. Gilbert, 2008 WL 2740453 (9th Cir.2008). Significantly, after
Heller, every court which has considered a Second Amendment challenge to the various subsections
 of Section 922, including Section 922(o), has upheld the statute as constitutional. United States v.
Marzzarella, 2009 WL 90395 (W.D.Pa. Jan.14, 2009) (citing cases). These courts have concluded
 that Heller does not

1 establish an unconditional right to possess a firearm. Under Heller, defendant has no right to possess
2 a machine gun.

3 Defendant's motion should be denied

4 DATED this 24thday of September 2009.

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6 Respectfully Submitted,

7 GREGORY A. BROWER
8 United States Attorney

9
10 */s/ J. Gregory Damm*
11 J. GREGORY DAMM
12 Assistant United States Attorney

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